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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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June 26, 2007

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The Honorable Samuel W. Bodman
Secretary
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

Dear Secretary Bodman:

On April 3, 2007, the Committee on Energy and Commerce requested two documents prepared for the Department of Energy's (DOE's) use involving a so-called "A-76 study" of the functions currently performed by the Radiological and Environmental Sciences Laboratory (RESL) in Idaho. This study determines whether this Federal reference laboratory should be privatized. The two documents we requested are:

- 1) Competitive Sourcing Feasibility Review for the RESL, May 17, 2006
- 2) Market Research Analysis Related to RESL (Second Round), March 15, 2007

The DOE's Office of Nuclear Energy currently operates RESL in support of activities carried out, in part, by the Office of Health, Safety and Security. This lab also serves as a reference lab for numerous other Federal agencies such as the Environmental Protection Agency and the Nuclear Regulatory Commission.

The Committee is evaluating whether the reference laboratory functions carried out by RESL are inherently governmental, or, if not inherently governmental, should nonetheless be performed by the Government. We are also evaluating whether there are qualified firms and whether such qualified firms would have any potential conflicts of interest in running this reference radiochemical lab.

On May 9, 2007, your General Counsel, David Hill, wrote the Committee declining to provide such information. He wrote, "The legal constraints on revelation of source selection

information imposed by the Procurement Integrity Act are grounded in the need for competitive procurement decisions to be wholly merits based and free of extraneous influence during the procurement process.”

Mr. Hill’s letter further asserts “the principles they reflect counsel against providing source selection information to jurisdictional committees during the pendency of a competitive solicitation absent circumstances indicating a particular legislative need.”

This analysis is legally faulty. The restrictions on disclosing and obtaining contractor bid or proposal information or source selection information in the Procurement Integrity Act 41 (U.S.C. 423(h)(5)) specifically precludes agency withholding of procurement and source selection information from Congress or a committee or subcommittee of Congress. The “Savings Clause” states:

“This section does not... (5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency.”

The law contains no requirement for Congress demonstrating a particular legislative need, despite the Department’s assertion to the contrary.

Moreover, we note that the House Energy and Water Appropriations Act for Fiscal Year 2008 (H.R. 2641) contains language eliminating funding for A-76 activities in the Department. If the Department is not prepared to be forthcoming with Congress regarding information about its A-76 market analyses and proposed privatizations at each and every stage of the process, it would not be prudent to continue appropriating or reprogramming funds to continue A-76 activities.

For the reasons stated above, the Committee reiterates its position that the requested documents be provided forthwith. Should the Department continue to withhold these documents based on an untenable legal foundation, the Committee will consider whether it will be necessary to authorize a subpoena for such records.

The Honorable Samuel W. Bodman
Page 3

If you have any questions, please contact us or have your staff contact John Sopko or Richard Miller with the Committee on Energy and Commerce staff, at (202) 226-2424.

Sincerely,



John D. Dingell
Chairman



Bart Stupak
Chairman
Subcommittee on Oversight and Investigations

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Ed Whitfield, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Peter J. Visclosky, Chairman
Subcommittee on Energy and Water Development Appropriations

The Honorable David L. Hobson, Ranking Member
Subcommittee on Energy and Water Development Appropriations